

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	CRIMINAL NO.
v.	:	
	:	96-202-1
JERRELL A. BRESLIN	:	

MEMORANDUM

Broderick, J.

February 5, 1998

On February 4, 1998, this Court denied Defendant Jerrell Breslin's motion for an evidentiary hearing and motion to order the government to file a motion for a downward departure pursuant to United States Sentencing Guideline § 5K1.1. This Memorandum more fully sets forth the Court's reasons for its denial.

Defendant Jerrell A. Breslin and his co-Defendants were initially charged in indictment 95-82. Defendant Breslin filed a Motion to Dismiss that indictment based on prosecutorial misconduct committed before the grand jury by the Assistant United States Attorney Michael Doss. On January 29, 1996, Judge Norma Shapiro granted Defendant's Motion and dismissed the indictment without prejudice. Defendant Breslin also filed complaints with the Office of Professional Responsibility of the Department of Justice in Washington, D.C. against Michael Doss and FBI Agent Nancy O'Dowd, the agent who headed the investigation in this case.

On May 9, 1996, Breslin and his four co-defendants were re-indicted in indictment number 96-202. This second indictment 96-202 was assigned to this Court. Shortly after the 96-202

indictment was filed, Michael Doss left the U.S. Attorney's office, and two new Assistant U.S. Attorneys were assigned to the case-- Thomas Perricone and Roberta Benjamin.

On July 17, 1997, Defendant Jerrell Breslin was convicted by a jury of one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, twelve counts of wire fraud, in violation of 18 U.S.C. § 1343, and four counts of unlawful monetary transactions, in violation of 18 U.S.C. § 1957. Sentencing proceedings in connection with Mr. Breslin began yesterday, February 4, 1998.

On February 3, 1998, Defendant filed a "Motion for Evidentiary Hearing Under Seal and Motion to Order the Government to Acknowledge that Jerrell A. Breslin Complied with the Requirements of the Sentencing Guidelines Section 5K1.1." In his Motion, Defendant Breslin alleges that he has provided substantial assistance to the government in the investigation of others, but that Assistant U.S. Attorney Thomas Perricone has refused to file a motion for a downward departure under U.S.S.G. § 5K1.1. Defendant alleges that the government is withholding the § 5K1.1 motion in retaliation for Defendant filing his motion to dismiss the original indictment for prosecutorial misconduct, and for Defendant filing complaints with the Department of Justice against Michael Doss and Nancy O'Dowd.

Section 5K1.1 of the United States Sentencing Guidelines provides in relevant part:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Section 5K1.1 does not authorize the sentencing court to depart from the guidelines based on a defendant's cooperation absent a government motion. U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990). The condition in U.S.S.G. § 5K1.1 which limits the court's authority to depart downward "gives the government a power, not a duty, to file a motion when a defendant has substantially assisted." Wade v. U.S., 504 U.S. 181, 185 (1992). Accordingly, the government has discretion in each case to determine whether the defendant has provided the kind of "substantial assistance" which merits a motion under § 5K1.1.

The Supreme Court has recognized, however, that the prosecutor's discretion in filing a § 5K1.1 motion is subject to constitutional limitations which district courts can enforce. Wade, 504 U.S. at 185. In Wade v. U.S., the Supreme Court held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." 504 U.S. at 185-6. However, the Supreme Court noted, "a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to... an evidentiary hearing... [n]or would additional but generalized allegations of improper motive." Id. at 186. A defendant has no right to an evidentiary hearing unless he

makes a "substantial threshold showing" of an unconstitutional motive on the part of the government. Id.

In the instant case, Defendant's written Motion did not set forth enough information to make the "substantial threshold showing" of unconstitutional motive required for an evidentiary hearing. Accordingly, the Court allowed Defendant Breslin and his counsel an opportunity to state what kind of evidence they would produce to support Defendant's allegations of unconstitutional motive, and allowed Defendant to introduce some preliminary testimony.

Defendant called FBI agent Michael Palasek to testify as to Defendant's assistance. Agent Palasek testified that, following his conviction in July, 1997, Mr. Breslin began cooperating with the FBI in connection with a case involving an obstruction of justice before a grand jury in Florida. Agent Palasek testified that Defendant Breslin himself was a subject of the grand jury investigation at issue. Agent Palasek further testified that Defendant Breslin had assisted the government in its investigation by providing truthful information to the government and doing all which was requested of him by the FBI. According to Agent Palasek, Mr. Breslin taped several phone calls, wore a wire to tape in-person conversations, and acquired documents which he turned over to the FBI. Agent Palasek testified that Mr. Breslin had been willing to cooperate further, although further cooperation had not been required. According to Agent

Palasek's testimony, no arrests had been made in that case and the FBI does not anticipate any arrests to be made in the future. Agent Palasek further testified that he contacted Defendant Breslin for assistance in another case in Florida in which the FBI was investigating a suspected loan shark. According to Agent Palasek's testimony, Mr. Breslin was again fully cooperative and provided assistance by acting as a target of the loan shark. Agent Palasek noted that no arrests had been made in this second investigation, though the case remained open.

Agent Palasek further testified that, in all of his dealings with Defendant Breslin, he had never represented that he could persuade the government to file a § 5K1.1 motion on Breslin's behalf. Indeed, Agent Palasek testified that he had told Breslin that he did not have the power to persuade the government to file a § 5K1.1 motion. Agent Palasek further testified that he had not made any recommendation to the government that Defendant Breslin should receive a § 5K1.1 motion.

Defendant contends that the evidence of Defendant's assistance, coupled with the history of this case-- particularly, the Defendant's earlier motion to dismiss the indictment based on prosecutorial misconduct and Defendant's complaints filed against Michael Doss and Nancy O'Dowd-- provide a "substantial threshold showing" of unconstitutional motive and thus merit an evidentiary hearing under Wade. The Court does not agree.

Defendant has not presented anything other than claims of substantial assistance and "generalized allegations of improper

motive"-- the kind of claims which were explicitly rejected by the Supreme Court in Wade. The Court will not infer an unconstitutional motive simply from the fact that Defendant has previously filed motions and complaints against the government, and has now provided assistance to FBI agents in connection with two investigations conducted in the state of Florida. As Agent Palasek's testimony made clear, Defendant's assistance has not been so extraordinary as to make the Court suspicious of the government's decision not to file a § 5K1.1 motion. Moreover, the Court notes that, at best, Defendant can only make out a tenuous connection between his protected activity (i.e., filing the motion to dismiss and lodging complaints against government employees) and the alleged retaliatory action taken by the current prosecutors in this case, Mr. Perricone and Ms. Benjamin. Defendant's complaints were against an Assistant U.S. Attorney who, as noted above, has since left the U.S. Attorney's office, and against FBI Agent O'Dowd who has no role in the prosecutor's decision to file a § 5K1.1 motion.

For these reasons, the Court finds that Defendant has failed to make a "substantial threshold showing" of unconstitutional motive on the part of the government with respect to the government's decision not to file a § 5K1.1 motion. The Court will thus deny Defendant's Motion for an Evidentiary Hearing and Motion to Order the Government to File a § 5K1.1 motion.

The Court notes however, that it will consider the Defendant's cooperation when sentencing him within the guideline

range.

An appropriate Order follows.